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Bank Southwest, N.A., f/k/a
Wachovia Mortgage, FSB, f/k/a
World Savings Bank, FSB ("Wells
Fargo")

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARTHA ALVAREZ, an individual,

Plaintiff,

vs.

WELLS FARGO BANK, N.A.,
successor by merger to WELLS FARGO
BANK SOUTHWEST, N.A., f/k/a
WORLD SAVINGS BANK, FSB; CAL-
WESTERN RECONVEYANCE
CORPORATION, a California
Corporation; and all persons or entities
unknown claiming any legal or equitable
right, title, estate, lien or interest in the
property described in this Complaint
adverse to Plaintiff's title thereto, and
DOES 1 through 25, inclusive,

Defendants.

CASE NO. 2:12-cv-09661-PA (RZx)

**WELLS FARGO BANK, N.A.'S
NOTICE OF MOTION AND
MOTION TO DISMISS FIRST
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

[Filed with separate Request For
Judicial Notice]

Date: January 21, 2013
Time: 1:30 p.m.
Ctm: 15

[Assigned to the Hon. Percy Anderson,
Dept. 15]

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

2 PLEASE TAKE NOTICE that on January 21, 2013, at 1:30 p.m. or as soon
 3 thereafter as the matter may be heard in Courtroom 15 of the above-entitled Court
 4 located at 312 North Spring Street Los Angeles, CA 90012, Defendant WELLS
 5 FARGO BANK, N.A., successor by merger with Wells Fargo Bank Southwest,
 6 N.A., formerly known as Wachovia Mortgage, FSB, formerly known as World
 7 Savings Bank, FSB ("Wells Fargo") will move to dismiss each claim for relief in
 8 the operative First Amended Complaint (FAC). The grounds for this motion to
 9 dismiss, brought pursuant to Federal Rules of Civil Procedure 12(b)(6), are:

10 First Claim for Relief: Unfair or Deceptive Business Practices in Loan
 11 Origination

12 The FAC fails to state a claim because: (i) the claim is preempted by the
 13 Home Owners' Loan Act (HOLA); (ii) the FAC fails to allege a factual or legal
 14 basis for the claim; (iii) the claim is time-barred; and (iv) the claim is not plead
 15 with adequacy or particularity.

16 Second Claim for Relief: Unfair and Deceptive Business Practices in Loan
 17 Servicing

18 The FAC fails to state a claim because: (i) the claim is preempted by HOLA;
 19 (ii) the FAC fails to allege a factual or legal basis for the claim; (iii) the claim is
 20 time-barred; and (iv) the claim is not plead with adequacy or particularity.

21 Third Claim for Relief: Unfair and Deceptive Business Practices in
 22 Foreclosure Process

23 The FAC fails to state a claim because: (i) the claim is preempted by HOLA;
 24 (ii) the FAC fails to allege a factual or legal basis for the claim; (iii) the claim is
 25 time-barred; and (iv) the claim is not plead with adequacy or particularity.

26 Fourth Claim for Relief: Fraud in Loan Origination

27 The c FAC fails to state a claim because: (i) the claim is preempted by
 28 HOLA; (ii) the FAC fails to allege a factual or legal basis for the claim; and

(iii) the claim is not plead with adequacy or particularity.

Fifth Claim for Relief: Breach of the Implied Covenant of Good Faith and Fair Dealing

The FAC fails to state a claim because: (i) the claim is preempted by HOLA; (ii) the FAC fails to allege a factual or legal basis for the claim; and (iii) the claim is not plead with adequacy or particularity.

Sixth Claim for Relief: Cancellation of Void Contract and Restitution

The FAC fails to state a claim because: (i) the claim is preempted by HOLA; (ii) the FAC fails to allege a factual or legal basis for the claim; (iii) the claim is not plead with adequacy or particularity; and (iv) Plaintiff has not tendered her outstanding indebtedness.

Seventh Claim for Relief: Quiet Title

The FAC fails to state a claim because: (i) the claim is preempted by HOLA; (ii) the FAC fails to allege a factual or legal basis for the claim; (iii) the claim is not plead with adequacy or particularity; and (iv) Plaintiff has not tendered her outstanding indebtedness.

Eighth Claim for Relief: Declaratory Relief

The FAC fails to state a claim because: (i) the claim is preempted by HOLA; (ii) the FAC fails to allege a factual or legal basis for the claim; (iii) the claim is not plead with adequacy or particularity; (iv) Plaintiff has not tendered her outstanding indebtedness; and (v) declaratory relief is not an independent cause of action.

This motion is based on this notice of motion and motion, the attached memorandum of points and authorities, the accompanying request for judicial notice and exhibits thereto, the documents on file in this action, the argument of counsel, and on such other information as the Court may deem appropriate.

Compliance with Local Rule 7-3. On December 12, 2012 (the day after Wells Fargo actually received the FAC), Wells Fargo's counsel emailed Plaintiff's

1 counsel requesting a meet-and-confer. In November, Wells Fargo's counsel sent a
 2 letter that described the grounds on which Wells Fargo would move to dismiss the
 3 original complaint and to strike certain portions thereof; and, having received no
 4 response to that letter, Wells Fargo filed those motions. Plaintiff's counsel did not
 5 respond to the December 12 email, and therefore the parties did not meet-and-
 6 confer.

7 Respectfully submitted,

8 Dated: December 21, 2012

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9 By: /s/ Viddell Lee Heard

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

This action represents Plaintiff's last-ditch effort to avoid the consequences of her years-long, admitted default on the mortgage loan she received in 2007 from Wells Fargo Bank, N.A., successor by merger to Wells Fargo Bank Southwest, N.A., f/k/a Wachovia Mortgage, FSB, f/k/a World Savings Bank, FSB ("Wells Fargo").¹

This motion explains why the first amended complaint (FAC) fails to state any claim on which relief may be granted. Each claim is preempted by regulations promulgated under the federal Home Owners' Loan Act (HOLA). Even if the claims were not preempted, they are unauthorized under California law for the many reasons explained below. Therefore, Wells Fargo asks the Court to dismiss the FAC under Federal Rules of Civil Procedure (FRCP) 9(b) and 12(b).

2. FACTS SUBJECT TO JUDICIAL NOTICE

The Mortgage Loan. Plaintiff has been a licensed real estate salesperson since 1989. *See* RJN, Ex. K (Dep't of Real Estate ID #01047112). In December 2007, she obtained from World Savings Bank (Wells Fargo's predecessor in interest) a \$860,000 loan for a property in Walnut, California. The loan was memorialized in a signed note and secured by a signed deed of trust. RJN, Exs. F and G. The deed of trust identifies "World Savings Bank, FSB, its successors and assignees" as the beneficiary. RJN, Ex. F at 1-2 (Article I(C) and (H)). Similarly, the note identifies "World Savings Bank, FSB, a federal savings bank, its successors and assignees" as the lender. RJN, Ex. G at 1.

¹ Wells Fargo Bank is essentially the successor to World Savings Bank, the entity from whom Plaintiff obtained her 2007 mortgage loan. This chain of corporate succession is more fully explained in Section 3, *infra*. For convenience, this brief will refer to these entities collectively as "Wells Fargo."

Plaintiff's Default On The Loan. In or about March 2009, Plaintiff defaulted on the loan. *See* RJN, Ex. H at 2 (referencing failure to make March 1, 2009 payment). As a result, a notice of default was recorded on July 30, 2009. *Id.* (noting Plaintiff over \$21,000 in arrears on her payments). Wells Fargo held off on foreclosure but, after nearly two years, it could wait no longer: a notice of sale was recorded on May 6, 2011 and on May 21, 2012. *See* RJN, Exs. I and J. By that time, the total amount owed (unpaid principal and interest, expenses such as property tax payments, foreclosure costs, etc.) totaled over \$1.05 million. *See id.*

3. PLAINTIFF'S CLAIMS ARE PREEMPTED BY HOLA

A. At The Time of Loan Origination, World Savings Bank, FSB, Was A Federal Savings Bank Operating Under HOLA

When Plaintiff took out her loan in 2007, World Savings Bank was a federal savings bank regulated by the Office of Thrift Supervision ("OTS"). *See* RJN, Exs. A and C. World changed its name to Wachovia Mortgage, FSB on December 31, 2007 (RJN, Ex. B) but it remained chartered under HOLA and overseen by the OTS. RJN, Ex. C. Effective November 1, 2009, Wachovia Mortgage, FSB became a division of Wells Fargo Bank, N.A. (RJN, Ex. D), until recently known as Wachovia Mortgage (RJN, Ex. E).² The deed of trust for the subject property

² HOLA applies even though successor Wells Fargo Bank is not chartered as a federal savings bank. *See Haggarty v. Wells Fargo Bank, N.A.*, 2011 U.S. Dist. LEXIS 9962 at *11 (N.D. Cal. Feb. 2, 2011); *DeLeon v. Wells Fargo Bank, N.A.*, 729 F. Supp. 2d 1119, 1126 (N.D. Cal. 2010) ("[T]he same preemption analysis would apply to any alleged misconduct after November 1, 2009, when the lender merged into a national savings banking association); *Guerrero v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 96261 (C.D. Cal. Sept. 14, 2010). "Where a national association . . . acquires the loan of a federal savings bank, it is proper to apply preemption under HOLA." *Id.* This is because, as the *Guerrero* court indicated, in a merger the surviving entity succeeds to the rights of the prior entity. *Id.*; *cf. Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1004-5 (9th Cir. 2008) ("[a]ny doubt should be resolved in favor of preemption") (quotations omitted).

expressly states that it and the note are “governed by and construed under federal law.” RJN, Ex. F ¶ 15.

B. OTS Regulations Promulgated Under HOLA Preempt Any State Laws that Affect Lending

Through its regulatory authority, the OTS “occupies the entire field of lending regulation for federal savings associations.” 12 C.F.R. § 560.2. OTS regulations issued pursuant to HOLA are “intended to preempt all state laws purporting to regulate any aspect of the lending operations of a federally chartered savings association, whether or not OTS has adopted a regulation governing the precise subject of the state provision.” *Lopez v. World Sav. & Loan Ass’n*, 105 Cal. App. 4th 729, 738 (2003); *see* 12 C.F.R. § 545.2.

As the OTS Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996) instructs, preemption analysis under HOLA is simple. Step one determines whether the type of state law at issue appears on the list set forth in 12 C.F.R. § 560.2(b), which lists the types of state laws that HOLA preempts. If the type of state law in question appears on the list, the analysis ends there and the law is preempted; there is no step two. As the Ninth Circuit observed in *Silvas*, 514 F.3d at 1004-05, the OTS’s construction of its own regulation 560.2 “must be given controlling weight.” The court went on to declare that any presumption against preemption of state law does not apply to HOLA, and that any doubt should be resolved in favor of preemption. *Weiss v. Washington Mutual Bank*, 147 Cal. App. 4th 72, 76-77 (2007) (holding that state common law claims including fraud and unfair completion, based on pre-payment penalties, were barred by HOLA).

C. State Laws Preempted by HOLA

The *Silvas* court described the HOLA regulations as “so pervasive as to leave no room for state regulatory control.” *Silvas*, 514 F.3d at 1004-05 (internal quotation omitted). Among those regulations are 12 C.F.R. § 560.2(b)(4), (9) and (10), which preempt state laws that “would impose requirements on federal savings

banks” regarding (emphasis added):

The *terms of credit*, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;

Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

“As outlined by OTS, the first step is to determine if [the law], as applied, is a type of state law contemplated in the list under paragraph (b) of 12 C.F.R. § 560.2. If it is, the preemption analysis ends.” *Silvas*, 514 F.3d at 1006; *see also id.* at 1005 n.1 (“This construction . . . by the OTS must be given controlling weight”). In performing this analysis, the issue is not whether the claim for relief usually or always falls within Section 560.2(b), but whether it does so *as applied* in the case at hand. *See, e.g., Curcio v. Wachovia Mortg. Corp.*, 2009 U.S. Dist. LEXIS 96155, at **15-16 (S.D. Cal. Oct. 14, 2009); *Silvas*, 514 F.3d at 1006 (finding Bus. & Prof. Code § 17200 preempted “as applied in this case.”)

D. HOLA Preempts Plaintiff’s Claims

The FAC alleges several categories of supposed misconduct by Wells Fargo. First, it alleges that the terms of the loan were deceptive or unfair, that Wells Fargo failed to adequately disclose those terms, and that the origination of the loan was

otherwise defective or improperly marketed to her. *See, e.g.*, FAC ¶¶ 16, 20-21, 25, 28, 32, 69-70, 91 (alleging that loan was “unconscionable”), 101. However, HOLA regulation 12 C.F.R. §§ 560.2(b)(4), (9) and (10) preempt claims based on the “terms of credit,” the lender’s “disclosure and advertising” (i.e., marketing), and – perhaps most importantly -- the “origination” of the loan.

Second, the FAC asserts wrongdoing in the servicing of Plaintiff’s loan, namely by alleging that Wells Fargo wrongfully failed to modify or consider Plaintiff’s request to modify the loan. *See, e.g.*, FAC ¶¶ 41 (claim asserting “unfair and deceptive practices in loan servicing”), 44-50, 62, 81-84. But HOLA regulation 12 C.F.R. § 560.2(b)(10) encompasses claims based on the “processing [or] servicing” of a loan, while 12 C.F.R. § 560.2(b)(4) encompasses claims pertaining to foreclosure (“the circumstances under which a loan may be called due and payable upon the passage of time”) and modification (“adjustments to the interest rate, balance, payments due, or term to maturity of the loan”).

Third, the FAC alleges that Wells Fargo failed to comply with certain foreclosure procedures. *See* FAC ¶¶ 61 (alleging supposedly “inappropriate[] dual tracking foreclosure”), 62 (alleging foreclosure “violated [statutory] public policy”) 101. HOLA regulation 12 C.F.R. § 560.2(b)(4) preempts claims pertaining to foreclosure (i.e., “the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan”).

The *Silvas* court made clear what happens when the allegations in a complaint fall within one of the categories listed under 12 C.F.R. § 560.2(b): “If so, the analysis will end there; the law is preempted.” *Silvas*, 514 F.3d at 1005. Here, every material basis of Plaintiff’s claims is preempted by HOLA regulations, and therefore those claims are as well.

E. Numerous Courts Have Recognized That HOLA Preempts Claims Such As Those Asserted Here

A long and growing list of federal courts have determined that claims such

1 as those at issue in this case are preempted by HOLA. Just four months ago, this
 2 Court dismissed a similar case after finding that the claims were preempted:

3 The FAC alleges that Wells Fargo rescinded the notice of
 4 default and did not send a certified letter as required by Civil
 5 Code § 2923.5(g)(3), thereby rendering the subsequent
 6 foreclosure void. However, HOLA regulation 12 C.F.R. §
 7 560.2(b)(4) encompasses claims pertaining to “the
 8 circumstances under which a loan may be called due and
 9 payable upon the passage of time or a specified event external
 10 to the loan,” while 12 C.F.R. § 560.2(b)(10) encompasses
 11 claims based on a loan’s “processing [or] servicing,” such as a
 12 bank’s actions in preparing a foreclosure. Next, the FAC alleges
 13 that someone at Wells Fargo agreed to modify Plaintiff’s loan .
 14 . . HOLA regulation 12 C.F.R. § 560.2(b)(4) encompasses
 15 claims pertaining to “adjustments to the interest rate, balance,
 16 payments due, or term to maturity of the loan” (i.e., loan
 17 modifications). Moreover, HOLA regulation 12 C.F.R.
 18 § 560.2(b)(10) covers claims based on a loan’s “processing [or]
 19 servicing,” which would include a bank’s consideration of a
 20 request for a loan modification. Finally, the FAC alleges that
 21 someone at Wells Fargo told Plaintiff that the foreclosure sale
 22 had been postponed. However, HOLA regulation 12 C.F.R.
 23 §§ 560.2(b)(4) covers the “terms of credit, including the
 24 circumstances under which a loan may be called due and
 25 payable upon the passage of time” (i.e., foreclosure), and 12
 26 C.F.R. §§ 560.2(b)(10) covers the “processing [or] servicing”
 27 of the loan, such as queries regarding foreclosure.
 28

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1 Like the other courts that have addressed the issue, this
 2 Court concludes that Plaintiff's state law claims are preempted
 3 by HOLA. [citations omitted] The Court therefore dismisses
 4 Plaintiff's claims with prejudice.

5 Order (Dkt. #27) in *Do v. Wells Fargo Bank, N.A.*, Case No. CV 12-5645
 6 PA (AGRx), (C.D. Cal. Aug. 27, 2012). The *Do* Order is attached as Exhibit L to
 7 the RJN. The Court should likewise dismiss this action with prejudice.

8 As recently stated in *Stefan v. Wachovia, World Savings*, 2009 U.S. Dist.
 9 LEXIS 113480, at *8-9 (N.D. Cal. December 7, 2009) (emphasis added):

10 The relief Plaintiff seeks under state tort and contract laws are
 11 of general applicability and do not explicitly regulate lending
 12 activities. To the extent that these state laws are applicable to
 13 the *foreclosure process or the loan agreement itself*, they are
 14 expressly preempted by section 560.2(b). Specifically,
 15 *Plaintiff's claims of misconduct surrounding the foreclosure*
 16 *proceedings clearly fall under the preemption provisions for*
 17 *"processing, origination, sale or purchase of ... mortgages"*
 18 *and "disclosure," Id.* (emphasis added).

19 In *Guerrero v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 96261 at *4
 20 (C.D. Cal. Sept. 14, 2010), the plaintiff contended that Wells Fargo falsely
 21 promised that it had canceled the foreclosure sale while it considered the plaintiff's
 22 loan application. The *Guerrero* court dismissed the plaintiff's claims for, *inter alia*,
 23 estoppel, breach of contract, fraud, and negligence because they "fall within the
 24 purview of Section 560.2(b), as they attack Defendant's disclosure and initiation of
 25 the foreclosure process." *Id.* at **9-10. The court in *Curcio v. Wachovia Mortg.*
 26 *Corp.*, 2009 U.S. Dist. LEXIS 96155 at *16-*18 (S.D. Cal. Oct. 14, 2009)
 27 dismissed, with prejudice, claims that were based in part on Wells Fargo's alleged
 28 refusal to modify the plaintiff's loan because: "each state Claim for Relief is

1 premised upon allegations regarding Defendant's lending obligations, including:
 2 terms of credit, 12 C.F.R. § 560.2(b)(4); disclosure, *Id.* § 560.2(b)(9); 9 and
 3 processing, origination, and servicing of mortgages, *Id.* § 560.2(b)(10). These
 4 activities are matters committed by Congress to regulation by a federal agency.”
 5 *Curcio*, 2009 U.S. Dist. LEXIS 96155 at *17; *see also Amaral v. Wachovia Mortg.*
 6 *Corp.*, 692 F. Supp. 2d 1226, 1238 (E.D. Cal. 2010) (finding claim based on
 7 allegation that bank “made false representations with the intent to induce plaintiffs
 8 to make monthly mortgage payments” to be preempted).

9 Moreover, courts have found that “claims of misconduct surrounding the
 10 foreclosure proceedings fall under the preemption provisions for ‘processing,
 11 origination, sale or purchase of . . . mortgages’ and ‘disclosure.’” *Curcio*, 2009
 12 U.S. Dist. LEXIS 96155 at *17-*18; *see also Nguyen v. Wells Fargo Bank, N.A.*,
 13 2010 U.S. Dist. LEXIS 113246 at *14 (N.D. Cal. October 25, 2010).

14 Accordingly, Wells Fargo respectfully requests that the Court grant this
 15 motion to dismiss *without* leave to amend. Plaintiff cannot “plead around” the fact
 16 that the FAC is based on matters preempted by federal regulations. Any
 17 amendment would be futile.

18 **4. THE FAC DOES NOT STATE A FRAUD CLAIM**

19 The Fourth Cause of Action alleges fraud in the origination of Plaintiff’s
 20 2007 loan. Plaintiff – who, again, is a real estate professional -- claims an
 21 employee of Wells Fargo “did not disclose” that various features of the loan such
 22 as the finance charge and total payments. *See* FAC ¶ 69. To state a fraud claim
 23 under California law, a plaintiff must allege: (i) a false representation as to material
 24 fact, (ii) knowledge of its falsity, (iii) intent to defraud, (iv) actual and justifiable
 25 reliance, and (v) resulting damage. *Wilhelm v. Pray, Price, Williams & Russell*,
 26 186 Cal. App. 3d 1324, 1331 (1986). FRCP 9(b), however, requires that fraud
 27 allegations be pled with particularity. *Glen Holly*, 100 F. Supp. 2d at 1093-1094.
 28 Rule 9(b) mandates the explicit identification of context. “This means the who,

1 what, when, where and how....” *Id.* at 1094. Vague or conclusory allegations are
 2 insufficient to satisfy Rule 9(b)’s particularity requirement. *See Moore v. Kayport*
 3 *Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

4 As against corporate defendants, Rule 9(b) requires plaintiffs to plead:
 5 (1) the misrepresentation, (2) the speaker and her authority to speak, (3) when and
 6 where the statements were made, (4) whether the statements were oral or written,
 7 (5) if written, the documents containing the representations, and (6) the manner in
 8 which the representations were allegedly false. *Ungerleider v. Bank of America*
 9 *Corp.*, 2010 U.S. Dist. LEXIS 138294 at *12 (C.D. Cal. Dec. 27, 2010).

10 **A. The Claim Is Time-Barred**

11 Under CCP § 338(d), the statute of limitations for a fraud claim is three
 12 years. Here, Plaintiff alleges a misrepresentation that took place prior to the
 13 origination of the loan in December 2007. *See* FAC ¶¶ 67-69. Therefore, the fraud
 14 claim became time barred as of December 2010 – nearly two years before Plaintiff
 15 filed this action.

16 **B. The FAC Fails To Establish A Duty of Disclosure**

17 The FAC alleges fraud by failure to disclose. *See* FAC ¶ 67. “[T]o establish
 18 fraud through nondisclosure or concealment of facts, it is necessary to show the
 19 defendant ‘was under a legal duty to disclose them.’” *OCM Principal*
 20 *Opportunities Fund, L.P. v. CIBC World Markets Corp.*, 157 Cal. App. 4th 835,
 21 846 (2007). “The general rule for liability for nondisclosure is that even if material
 22 facts are known to one party and not the other, failure to disclose those facts is not
 23 actionable fraud unless there is some fiduciary or confidential relationship giving
 24 rise to a duty to disclose.” *Kovich v. Paseo Del Mar Homeowners’ Ass’n*, 41 Cal.
 25 App. 4th 863, 866 (1996). However, “[a]s a general rule, ‘a financial institution
 26 owes no duty of care to a borrower when the institution’s involvement in the loan
 27 transaction does not exceed the scope of its conventional role as a mere lender of
 28 money.’” *Velasquez v. Chase Home Finance LLC*, 2010 U.S. Dist. LEXIS 82065,

at *5 (N.D. Cal. 2010) (quoting *Nymark v. Heart Fed. Sav. & Loan Assn.*, 231 Cal. App. 3d 1089, 1096 (1991)); see also *Gonzalez v. First Franklin Loan Services*, 2010 U.S. Dist. LEXIS 1657, 2010 WL 144862 *8 (E.D. Cal. Jan. 11, 2010) (same); *Nymark*, 231 Cal. App. 3d at 1092 ("[A] financial institution acting within the scope of its conventional activities as a lender of money owes no duty of care to a borrower in preparing an appraisal of the security for a loan when the purpose of the appraisal simply is to protect the lender by satisfying it that the collateral provides adequate security for the loan").

Here, Wells Fargo was acting in its traditional role as a lender in originating the loan, as opposed to acting as an investment advisor or joint venturer. *See, e.g.*, RJN, Exs. F and G (standard loan agreements). Therefore, Wells Fargo owed Plaintiff no duty of disclosure, and the fraud claim fails to state a valid cause of action.

5. THE FAC DOES NOT STATE A CLAIM FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The "implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract." *Pasadena Live, LLC v. City of Pasadena*, 114 Cal. App. 4th 1089, 1093-94 (2004). "[T]he implied covenant will only be recognized to further the contract's purpose; it will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself." *Wolf v. Walt Disney Pictures and Television*, 162 Cal. App.4th 1107, 1120 (2008). "This covenant is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose." *Id.*

The Seventh Cause of Action alleges that Wells Fargo "prevented Plaintiff from receiving the benefits of the loan agreement" by "refus[ing] to properly and legitimately review Plaintiff's loan modification applications." FAC ¶ 84. But this

1 is a non-sequitur: a request for a loan modification is a request to *change* the
 2 existing terms of a contract, not to “protect” or “assur[e] compliance” with them.
 3 Wells Fargo cannot have interfered with the benefits of the existing contract by
 4 refusing to change those terms. Neither the note nor deed of trust contain an
 5 express provision requiring Wells Fargo to renegotiate the terms of the agreement
 6 if Plaintiff becomes unable to afford the payment. To the contrary, the agreements
 7 expressly deem the borrower’s failure to pay a “default” and give Wells Fargo the
 8 right to “exercise the power of sale . . . and invoke such other remedies as may be
 9 permitted under any applicable law.” RJN, Exs. F ¶ 28 and G ¶¶ 7(B) and 11. As
 10 the *Wolf* court held, the implied covenant may not be read to prohibit Wells Fargo
 11 from that which is expressly permitted by the agreement. *Wolf*, 162 Cal. App.4th at
 12 1120.

13 To the extent that Plaintiff contends otherwise, she merely confirms that the
 14 claim is preempted by HOLA. Those regulations were intended to free federal
 15 savings banks from such state-specific duties. *See* 12 C.F.R. § 560.2(a).

16 **6. THE FAC DOES NOT STATE CLAIMS FOR VIOLATION OF**
 17 **BUSINESS & PROFESSIONS CODE § 17200 et seq.**

18 The First through Third Causes of Action assert claims for violation of Bus.
 19 & Prof. Code § 17200 *et seq.* (“Section 17200”). The First Cause of Action is
 20 based on the origination of the loan, the Second Cause of Action is based on the
 21 “loan servicing,” and the Third Cause of Action is based on “the foreclosure
 22 process.” *See* FAC at 6, 9, 13. These claims each fail.

23 **A. The Claims Are Preempted**

24 As more fully discussed in Section 3, *supra*, each of the Section 17200
 25 claims is preempted by HOLA. The *Silvas* case is right on point. The plaintiffs in
 26 *Silvas* alleged that the lender made “misrepresentations” in its advertising to
 27 borrowers, thereby violating Business & Professions Code §§ 17200 and 17500.
 28 *Id.* at 1003 (also characterizing the material as a “false statement”), 1006.

1 Nevertheless, the Ninth Circuit ruled that these claims were entirely preempted by
2 HOLA regulations:

3 Here, Appellants allege that E*TRADE violated *UCL § 17500*
4 by including false information on its website and in every
5 media advertisement to the California public. Because this
6 claim is entirely based on E*TRADE's *disclosures and*
7 *advertising*, it falls within the specific type of law listed in §
8 *560.2(b)(9)*. Therefore, the preemption analysis ends. *UCL §*
9 *17500* as applied in this case is preempted by federal law.

10 . . .

11 Appellants allege E*TRADE's practice of misrepresenting
12 consumers' legal rights in advertisements and other documents
13 is contrary to the policy of California and thus violates *UCL §*
14 *17200*. This claim, similar to the claim under § *17500*, fits
15 within § *560.2(b)(9)* because the alleged misrepresentation is
16 contained in advertising and disclosure documents.

17 *Silvas*, 514 F.3d at 1006 (footnote omitted, emphasis in original).

18 As the quoted passage indicates, because the *subject matter* of the *Silvas*'
19 claims fell within one of the categories listed in 12 C.F.R. § 560.2(b), the *Silvas*
20 court held that those claims alleging pervasive misrepresentations were preempted.

21 Here, there can be no dispute that the subject matter of Plaintiff's Section
22 17200 claims fall within one or more categories of 12 C.F.R. § 560.2(b).
23 Regulation 12 C.F.R. §§ 560.2(b)(4) and (10) encompass claims based on the
24 "terms of credit" and the "origination" of the loan, and therefore preempt the First
25 Cause of Action. *See* FAC at 7 (claim based on "loan origination" and challenging
26 "deceptive terms" and "predatory nature" of loan). Regulation 12 C.F.R. §
27 560.2(b)(4) and (10) encompass claims based on the "adjustments to the interest
28 rate, balance, payments due, or term to maturity of the loan" (i.e., modification)

1 and the “servicing” of a loan, and therefore preempt the Second Cause of Action.
 2 *See* FAC at 10-13 (claim based on “loan servicing” and alleging wrongful failure
 3 to modify loan). And regulation 12 C.F.R. § 560.2(b)(4) covers claims based on
 4 “the circumstances under which a loan may be called due and payable upon the
 5 passage of time” (i.e., foreclosure), and therefore preempts the Third Cause of
 6 Action. *See* FAC at 13 (claim based on “foreclosure process”).

7 **B. The Claims Lack The Required Particularity**

8 A Section 17200 claim must state the facts supporting the alleged violation
 9 with reasonable particularity. *Khoury v. Maly’s, Inc.*, 14 Cal. App. 4th 612, 619
 10 (1993); *Nguyen*, 2010 U.S. Dist. LEXIS 113246 at *42; *Covenant Care, Inc. v.*
 11 *Superior Court*, 32 Cal. 4th 771, 790 (2004) (“statutory causes of action must be
 12 pleaded with particularity”). Moreover, to heavy the extent the Section 17200
 13 claims rely on allegations of fraud, they must comply with the particularity
 14 requirement of FRCP 9(b). Here, however, the claims rely on vague, boilerplate
 15 allegations of “unfair” terms and “deceptive” practices. They do not disclose the
 16 required “who, what, when, where and how” of each instance of fraud.

17 **C. The First Cause of Action Is Time-Barred**

18 The statute of limitations for a Section 17200 claim is four years. *See* Bus. &
 19 Prof. Code § 17208. Therefore, the First Cause of Action based on events taking
 20 place during the 2007 origination of the loan became time-barred as of December
 21 2011.

22 **7. PLAINTIFF’S CLAIMS FOR EQUITABLE RELIEF FAIL**

23 The First through Third and Sixth through Eighth Causes of Action seek
 24 various forms of equitable relief: cancellation of the loan agreements, quieting title
 25 in Plaintiff’s favor (and stripping Wells Fargo of all interest in the property), a
 26 declaration that Wells Fargo has no interest in the property, and, in the Prayer for
 27 Relief, an injunction preventing Wells Fargo from, at long last, foreclosing on the
 28

1 property after nearly Plaintiff's four years of default.³ Each claim is fatally
2 defective.

3 **A. Plaintiff's Failure To Tender Her Outstanding Indebtedness Precludes**
4 **Equitable Relief**

5 A debtor seeking an injunction or other equitable relief must tender her
6 outstanding debt. *See FPCI Re-Hab 01 v. E & G Invs.*, 207 Cal. App. 3d 1018,
7 1021 (1989); *Sipe v. McKenna*, 88 Cal. App. 2d 1001, 1006 (1948) ("A party may
8 not without payment of the debt, enjoin a sale by a trustee under a power conferred
9 by a deed of trust, or have his title quieted."). A mortgagor may not maintain a
10 quiet title action against the mortgagee without first paying the outstanding debt on
11 which the subject mortgage is based. *Miller v. Provost*, 26 Cal. App. 4th 1703,
12 1707 (1994) ("[A] mortgagor of real property cannot, without paying his debt,
13 quiet his title against the mortgagee"); *Aguilar v. Bocci*, 39 Cal. App. 3d 475, 477
14 (1974) ("The cloud upon...title persists until the debt is paid"). Indeed, equitable
15 principles mandate that when a mortgagor seeks to quiet title as to a mortgagee
16 without first discharging her contractual obligations, such action should be
17 conditioned upon the return of amounts advanced by the mortgagee. *Burns v. Hiatt*,
18 149 Cal. 617, 621-22 (1906). This "tender rule" also applies to claims for
19 cancellation of instruments. *See Jelsing v. MIT Lending*, 2010 U.S. Dist. Lexis
20 38515 at *15 (S.D. Cal. July 9, 2010).

21 "The rules which govern tenders are strict and are strictly applied." *Nguyen*
22 *v. Calhoun*, 105 Cal. App. 4th 428, 439 (2003). A complaint that does not allege
23 such a tender does not state a claim for relief under California law. *McElroy v.*
24

25 _____
26 ³ The First through Third Causes of Action each seek relief under Section 17200,
27 under which damages are not an available remedy. *See Korea Supply*, 29 Cal. 4th
28 1134, 1140 (2003). Accordingly, the FAC seeks "injunctive relief, restitution and
such further relief as is set forth" in the Prayer for Relief. *See* FAC ¶¶ 40, 56, 63.

1 *Chase Manhattan Mortg. Corp.*, 134 Cal. App. 4th 388 (2005).

2 Numerous federal courts have applied the tender rule in dismissing lawsuits
 3 such as the one at hand. *See Nguyen*, 2010 U.S. Dist. LEXIS 113246 at *31-36
 4 (citing cases); *Collins v. Power Default Services, Inc.*, 2010 U.S. Dist. LEXIS
 5 3361, at *4-*6 (N.D. Cal. Jan. 24, 2010) (citing California state and federal cases).
 6 “The application of the ‘tender rule’ prevents ‘a court from uselessly setting aside a
 7 foreclosure sale on a technical ground when the party making the challenge has not
 8 established his ability to purchase the property.’” *Nguyen*, 2010 U.S. Dist. LEXIS
 9 113246, at *32. The Ninth Circuit has also recognized and enforced this “tender
 10 rule.” *See Guerrero v. Greenpoint Mortg. Funding*, 2010 U.S. App. LEXIS 21617,
 11 at *3 (9th Cir. Oct. 7, 2010) (borrowers “lacked standing to bring a claim for
 12 ‘wrongful foreclosure,’ because they failed to allege actual, full, and unambiguous
 13 tender of the debt owed on the mortgage.”)

14 Here, Plaintiff has not alleged that she tendered her outstanding debt, and
 15 her nearly four-year-long default makes clear that she has not done so. Therefore,
 16 the above-stated claims fail to state claims on which relief may be granted under
 17 California law.

18 **B. Declaratory And Injunctive Relief Are Not An Independent Causes Of**
 19 **Action**

20 As numerous federal courts have held, injunctive and declaratory relief are
 21 remedies, not independent causes of action. *See Bridgeman, Jr. v. United States of*
 22 *America*, 2011 U.S. Dist. Lexis 6059 at *59-*60 (E.D. Cal. Jan. 21, 2011) (citing
 23 cases); *Santos v. Countrywide Home Loans*, 2009 U.S. Dist. LEXIS 103453, 2009
 24 WL 3756337, at *5 (E.D. Cal. Nov. 6, 2009) (“Declaratory and injunctive relief are
 25 not independent claims, rather they are forms of relief.”) *Lane v. Vitek Real Estate*
 26 *Indus. Group*, 713 F. Supp. 2d 1092, 1104 (E.D. Cal. 2010) (same). Similarly, a
 27 claim for cancellation of instruments “is really a claim for rescission . . . [a]nd
 28 rescission is a remedy, not an independent cause of action.” *Jelsing*, 2010 U.S.

1 Dist. Lexis 38515, at *15. Therefore, the Sixth and Eighth Causes of Action do not
2 state any claims for relief.

3 **C. The Quiet Title Claim Is Premature and Plaintiff Lacks Standing to**
4 **Pursue It**

5 The Seventh Cause of Action seeks to quiet title in Plaintiff's name, alleging
6 that "Defendants . . . allegedly obtained the Subject Property through fraud and
7 wrongful conduct, and failed to adhere to the strict statutory requirements to
8 effectuate a foreclosure sale of the Subject Property." FAC ¶ 101. This assertion
9 was simply copied-and-pasted from a different pleading. In this case, Wells Fargo
10 has not yet foreclosed on the property, and the FAC does not allege otherwise.
11 Therefore, the quiet title claim seeking to reverse a non-existent foreclosure is
12 premature at best.

13 Plaintiff also lacks standing to assert the claim because an action to quiet
14 title cannot be maintained by the owner of equitable title as against the holder of
15 legal title. *See e.g., G.R. Holcomb Estate Co. v. Burke*, 4 Cal. 2d 289, 297-299
16 (1935). In *G.R. Holcomb Estate*, the California Supreme Court declared:

17 Both the pleadings and the evidence disclose the fact that the
18 legal title to these lands stands in the name of the defendants.

19 At most the plaintiff claims to be the equitable owner of said
20 lands. It has been repeatedly held in this state that an action to
21 quiet title will not lie in favor of the holder of an equitable title
22 as against the holder of a legal title. [Citation.] Under this
23 doctrine, plaintiffs action to quiet title to said lands must fail.

24 *See also Lewis v. Superior Court*, 30 Cal.App.4th 1850, 1866 (1994) (party
25 "never had standing to bring a quiet title action, because whatever interest it might
26 have is only equitable, and the holder of equitable title cannot maintain a quiet title
27 action against the legal owner"); *Stafford v. Ballinger*, 199 Cal.App.2d 289, 294 -
28 295 (1962) (complaint does not state cause of action to quiet title because it

1 “disclose[s] that appellant does not have legal title to the property in question” and
 2 “[i]t has been held consistently that the owner of an equitable interest cannot
 3 maintain an action to quiet title against the owner of the legal title”.) Plaintiff
 4 therefore may not maintain a quiet title action against Wells Fargo.

5 **D. Each Equitable Claim Lacks Any Basis For Granting Relief**

6 Each equitable claim is based on the allegations of the prior claims. As
 7 demonstrated elsewhere in this brief, those other claims fail to state any basis for
 8 relief. Therefore, the equitable claims likewise fail to establish a basis for equitable
 9 relief.

10 **8. CONCLUSION**

11 For each of the foregoing reasons, Wells Fargo requests that the Court grant
 12 this motion to dismiss without leave to amend.

13
 14 Respectfully submitted,

15 Dated: November 16, 2012

ANGLIN, FLEWELLING, RASMUSSEN,
 CAMPBELL & TRYTTEN LLP

17 By: /s/ Viddell Lee Heard

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 WELLS FARGO BANK, N.A., successor by
 merger with Wells Fargo Bank Southwest, N.A.,
 formerly known as Wachovia Mortgage, FSB,
 formerly known as World Savings Bank, FSB
 (“Wells Fargo”)

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, declare that I am over the age of 18 and am not a party to
3 this action. I am employed in the City of Pasadena, California; my business
4 address is Anglin, Flewelling, Rasmussen, Campbell & Trytten LLP, 199 S. Los
5 Robles Avenue, Suite 600, Pasadena, California 91101-2459.

6 On the date below, I served a copy of the foregoing document entitled:

7 **WELLS FARGO BANK, N.A.'S NOTICE OF MOTION AND**
8 **MOTION TO DISMISS FIRST AMENDED COMPLAINT;**
9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 on the interested parties in said case as follows:

11 **Served Electronically Via the Court's CM/ECF System**

12 *Attorneys for*
13 *Plaintiff*

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23 I declare under penalty of perjury under the laws of the United States of
24 America that the foregoing is true and correct. I declare that I am employed in
25 the office of a member of the Bar of this Court, at whose direction the service
26 was made. This declaration is executed in Pasadena, California on December 21,
27 2012.

28 Christine Daniel
(Type or Print Name)

/s/ Christine Daniel
(Signature of Declarant)

ANGLIN FLEWELLING RASMUSSEN CAMPBELL & TRYTTEN LLP